

STATE OF MICHIGAN
COURT OF APPEALS

HARRY BLACKWARD and D'ANNE
KLEINSMITH,

UNPUBLISHED
October 19, 2001

Plaintiff-Appellees,

v

No. 221066
Oakland Circuit Court
LC No. 97-551584

SIMPLEX PRODUCTS DIVISION and K2, INC.,

Defendant-Appellees/Cross-
Appellants.

Before: K.F. Kelly, P.J., and O'Connell and Cooper, JJ.

K.F. KELLY. P.J. (*concurring*).

I concur in the result but write separately to underscore the notion that in my estimation, the specific purposes underlying the Uniform Commercial Code (hereinafter "UCC") are not furthered when applied to transactions involving individual consumers which are, by definition, not "commercial transactions."

Although the instant appeal presents a case of a "transaction in goods, the critical question is whether it was a "*commercial* transaction in goods" which I believe is the hallmark of transactions governed by the UCC. The defendant frames the issue as "whether the economic loss doctrine applies to bar tort recovery for wholly economic loss arising from an allegedly defective product where the purchasers are consumers." To that pivotal question, I would add, "in a *non-commercial* transaction."

In my opinion, it is not necessarily the nature of the loss alone that triggers application of the UCC but also an appreciation for the nature of the transaction and the character of the parties involved. Applying the economic loss doctrine to bar recovery in tort, the court in *Sullivan Industries Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 344; 480 NW2d 623 (1991) reasoned that, "[a]llegations of only economic loss do not implicate tort law concerns with product safety *but do implicate commercial law concerns with economic expectation.*" (Emphasis added.) (Citation omitted.)

The crucial difference between *Sullivan* and the instant case, however, is the character of the parties involved and the nature of the transaction. Although in *Sullivan*, the court focused on the type of loss sustained by the plaintiff for purposes of determining whether the UCC governed the dispute, of particular significance, is the character of both the plaintiff and the defendant.

Both of the parties in *Sullivan* were “commercial” entities. The plaintiff was a manufacturer and the defendant was a supplier. Thus, both parties had a purely economic interest in their contractual relations.

In the case at bar, plaintiff is an individual consumer and defendant is a “commercial” entity. Unlike the situation in *Sullivan*, the plaintiff in this case, being a non-commercial entity, had more than just an economic expectation in the contractual relationship. I do not believe that the presence of one commercial entity automatically transforms the transaction into a “commercial transaction.” Although the plaintiffs sustained serious economic loss as a result of the defect in the external insulation finish system (hereinafter the EIFS), that does not eradicate the very personal loss that plaintiffs sustained, an interest that the UCC was neither created nor intended to redress.

The legislature adopted the UCC to 1) “simplify, clarify and modernize the law governing *commercial transactions*,” 2) “permit the continued expansion of *commercial practices* through custom, usage and agreement of the parties,” and 3) “make uniform the law among the various jurisdictions.” See MCL 440.1102 (2)(a), (b), and (c) respectively. (Emphasis added.) The operative word in MCL 440.1102 (2)(a) and (b) is the term “commercial.” The statute employs the term “commercial” as an adjective to modify the word “transactions.” Therefore, the word “commercial” specifies to what class of transactions the code seeks to “simplify,” “clarify” and “modernize.” Interestingly, the code itself never defines the word “commercial.” Accordingly, the court may consult a standard dictionary to discern the meaning of that particular term. *Morinelli v Provident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000).

The Random House Webster’s College Dictionary (2d ed., 1997) defines the word “commercial” as “produced, marketed, etc. with emphasis on salability, profit, or the like.” An additional aspect of the term refers to “work that is intended for the mass market.” *The American Heritage Dictionary* (2d ed., 1985). If the UCC was adopted to “simplify” and “make uniform” commercial transactions, then on some level, the code contemplates a “transaction” entered into for purposes of “salability,” “profit,” or “mass production.”

The language employed in Article 2 evidences a tacit supposition pertaining to the level of bargaining sophistication as between buyers and sellers not at all present in this case. For instance, the official commentary following MCL 440.2104 which defines the term “merchant” for purposes of the code, recognizes that “[t]his Article (Article 2) *assumes* that transactions *between professionals* in a given field require special and clear rules which *may not apply to a casual or inexperienced seller or buyer*.” (Emphasis added.)

In this particular transaction, plaintiff was a “casual or inexperienced . . . buyer.” Plaintiff did not have a profit motive when he purchased the EIFS from the manufacturer. On the contrary, he purchased the EIFS to have the builder affix it to his own personal residence. Clearly, in this case, plaintiff is merely a consumer and not in the business of purchasing outside insulation systems for profit. Accordingly, applying the UCC and the economic loss doctrine in this particular case to preclude plaintiff’s recovery in tort will not further *any* of the UCC’s specified goals. The manufacturer’s sale of the external siding system to plaintiff as an individual consumer to employ solely for his own personal use will do nothing to “simplify,” “clarify,” or “modernize” the law concerning “commercial transactions.”

Similarly, application of the UCC will not contribute to “the continued expansion of commercial practices through custom, usage, and agreement of the parties” nor will it be a factor in “mak[ing] uniform the law among the various jurisdictions.” In fact, this particular transaction will do absolutely nothing to define custom and usage because this individual consumer is not in the business of purchasing external siding systems for any commercial purpose and will likely never purchase this siding or any other type of siding in the future. Therefore applying the UCC to this individual consumer in this one, single, isolated transaction will neither advance nor refine the law governing commercial transactions in general.

Where an individual consumer purchases an item or a “good” that malfunctions and causes damage, the remedies provided for by the UCC are inadequate. The case *sub judice* presents a classic consumer transaction despite the manufacturer’s commercial status. Even the majority in *Neibarger v Universal Cooperatives*, 439 Mich 512; 486 NW2d 612 (1992) recognized that the UCC applies to transactions having a commercial dimension when it stated that “where . . . the claims arise from a *commercial transaction* in goods . . .” *Id.* at 520 a plaintiff’s exclusive recourse “for economic loss caused by a defective product *purchased for commercial purposes*” are the remedies provided by the UCC. *Id.* at 528. The *Neibarger* court did not want to render the UCC nugatory by permitting “*commercial purchasers* [to] sue in tort to recover economic loss, [lest] contract law . . . drown in a sea of tort.” *Id.* (Citations omitted.) (Emphasis added.) Indeed, permitting a *commercial* buyer to sue a *commercial* seller in tort would undermine the very purposes for which the legislature adopted the UCC.

In commercial transactions, the purchaser has an economic expectation that contract law will protect and contract remedies will adequately redress in the event of a breach. See *Sullivan*, *supra* at 342.¹ In a non-commercial setting, the purchaser does not merely have an economic interest in the transaction itself. There is a personal component inherent in consumer transactions not contemplated by the UCC and not reflected in the available remedies. Thus, restricting an individual consumer to the remedies provided in the UCC for a non-commercial transaction would deny recovery for a personal expectation that is not purely economic in nature. The body of tort law protects the personal component in consumer transactions that is simply not present in sterile commercial transactions between purely commercial entities².

In fact, our Legislature specifically recognized this critical distinction in MCL 600.2945(h) which defines “product liability action” as “an action based on a legal or equitable theory of liability brought for . . . injury to a person or *damage to property* caused by or resulting from the production of a product.” (Emphasis added.) Indeed, if all transactions involving at

¹ See also *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 402; 586 NW2d 549 (1998) wherein the court applied the economic loss doctrine “because the consequences of the product’s potential failure were likely to have been within the contemplation of the parties when they entered into the agreement.” Like the parties in *Sullivan*, both the plaintiff and the defendant in *MASB-SEG*, *supra*, were “sophisticated commercial entities who had the knowledge and ability to allocate liability in their [contract].” *Id.*

² As one leading commentator observed, tort law protects “interests of personality,” “property interests,” and “relational interests.” See *Berger v Weber*, 411 Mich 1, 34; 303 NW2d 424 (1981) (citing Green, Relational Interests, 29 Ill.L.Rev. 460 (1934)). Sixty-seven years later, these interests remain intact.

least one commercial entity automatically transformed the innate character of that transaction into a “commercial transaction” governed by the UCC, then a substantial portion of the law and the remedies available through an action sounding products liability would be rendered completely nugatory.

In the case at bar, it is undisputed that plaintiff did not have an economic interest or objective when he purchased the EIFS from defendant for use in his own personal residence. On the contrary, plaintiff had a vested *personal* interest in the products used in his home which, according to plaintiff, was irreparably compromised due to a defect in the EIFS; a product supplied by defendant. Although plaintiff suffered economic losses as a result of defendant’s defective external insulation system, nevertheless, plaintiff, quite appropriately, seeks redress in tort not only for the damage to his personal property which caused extensive economic loss but also for the obliteration of his personal expectations.

/s/ Kirsten Frank Kelly